

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FRED J. CHURCH

Claimant

VS.

**WHITE STAR COMMERCIAL
COATING, INC., (Uninsured) and
MCIPHERSON CONTRACTORS, INC.,**

Respondent

AND

KANSAS BUILDING INDUSTRY W.C. FUND,

Insurance Carrier

Docket No. 204,042

ORDER

Claimant requested Appeals Board review of Administrative Law Judge Bryce D. Benedict's November 17, 1998, Award. The Appeals Board heard oral argument in Topeka, Kansas, on June 23, 1999.

APPEARANCES

Claimant appeared by his attorney, Jan L. Fisher appearing for Beth Regier Foerster of Topeka, Kansas. The respondent, McPherson Contractors, Inc., and its insurance carrier appeared by their attorney, Matthew S. Crowley of Topeka, Kansas. White Star Commercial Coating, Inc., did not appear.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

On June 5, 1995, claimant was working as a painter on scaffolding that collapsed causing claimant to fall approximately nine feet. As a result of the fall, claimant injured

his right hand, left knee, low back, and left hip. On the date of the accident, claimant had been employed by White Star Commercial Coating, Inc., (White Star) for approximately three weeks. Claimant was working on a construction project for White Star who was a subcontractor of the principal contractor, McPherson Contractors, Inc., (McPherson). During the litigation of this claim, White Star was found to be an uninsured employer, and claimant amended his Application for a Hearing to include the principal contractor, McPherson, as the statutory employer of the claimant.¹

The Administrative Law Judge found claimant had suffered a lacerated right hand, left knee, and low-back injury as a result of the June 5, 1995, work-related fall. But he limited claimant to permanent partial disability benefits for a scheduled injury to claimant's left knee.² The Administrative Law Judge found claimant's injuries to his right hand, low back, and left hip did not result in any permanent functional impairment. The Administrative Law Judge further found that the record proved that claimant had a preexisting left knee injury and this injury resulted in an additional two percent functional impairment.³

On appeal, claimant contends he proved he also sustained a permanent functional impairment of the left hip as a result of his work-related fall. Thus, claimant argues he is entitled to a whole body disability. Therefore, claimant contends, because White Star did not retain him as a employee and he has failed to find a job paying at least 90 percent of his pre-injury average weekly wage, he is entitled to a substantial work disability.⁴ Also, claimant argues the record fails to prove that claimant had a preexisting impairment of the left knee that is required to reduce any compensation awarded.

Conversely, McPherson contends claimant only injured his right hand and at best aggravated a preexisting left knee condition. Respondent argues there is no evidence that the right hand injury resulted in any permanent functional impairment and if claimant's preexisting left knee condition was permanently aggravated, then the medical evidence only proves that this accident caused two percent of claimant's total left knee functional impairment. In McPherson's brief, it also questions the Administrative Law Judge's findings on average weekly wage; failure to award costs against the claimant for an appointment claimant missed with McPherson's vocational expert; and the failure to order the subcontractor to indemnify McPherson for all amounts paid in this claim, including attorney fees.

¹See K.S.A. 1994 Supp. 44-503.

²See K.S.A. 44-510d(16).

³See K.S.A. 44-501(c).

⁴See K.S.A. 44-510e.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board makes the following findings and conclusions:

What is the nature and extent of claimant's disability?

Did claimant prove he suffered a permanent low-back and/or left hip injury in the work-related June 5, 1995, fall?

On June 5, 1995, claimant lacerated his right hand when the scaffolding he was working on collapsed and he fell some nine feet to the ground. Claimant was taken to a local hospital emergency room for medical treatment. The emergency room physician sutured claimant's right lacerated hand and took claimant off work for five days. Claimant was also directed to return in one week to remove the sutures. Claimant made no complaints of injuries other than the right hand laceration.

Claimant returned to work the next day because his supervisor told him he had to come to work as White Star did not want this incident on their insurance. Claimant testified his left knee started hurting and swelling within two or three days of the accident. On June 17, 1995, after work, claimant was walking down some stairs when his left knee gave out. Claimant did not fall because he had hold of the stair railing. After this incident, claimant returned to the local hospital emergency room for treatment. Claimant was diagnosed with left knee effusion and during the emergency room visit, claimant also complained of low-back pain. The emergency room physician referred claimant for further examination and treatment to orthopedic surgeon John A. Lynch, M.D., of Topeka, Kansas.

Dr. Lynch saw claimant on June 19, 1995. Claimant had worked at the Goodyear tire plant in Topeka, Kansas, for some 22 and a half years. Dr. Lynch had treated claimant for various injuries he received while working for Goodyear. During this visit, claimant complained of pain in his left knee, left hip, and low back. Dr. Lynch reviewed the x-rays, taken during claimant's recent emergency room visit, of claimant's left knee and left low back. He also performed a physical examination in regard to claimant's left knee and low back. The doctor found some tenderness in claimant's left lower back but no significant range of motion restriction, normal straight leg raises, and normal x-rays. In regard to the left knee, he found some unusual condensation and some early degenerative arthritis. Dr. Lynch's initial impression was probable contusion and sprain of the left knee and lower back. Claimant was released to return to work at ground level only.

Dr. Lynch saw claimant again on June 28, 1995, with some pain, swelling, and effusion of the left knee but improving. Claimant also had some residual low-back pain. The ground level working restriction remained in place. At that time, claimant's knee was given a cortisone injection.

Claimant returned to Dr. Lynch on July 5, 1995. Claimant was found to have continued left knee effusion, but improved. At this time, no low-back complaints were noted. Claimant had returned to regular work except for above ground level work. Dr. Lynch told claimant to return in two or three weeks but claimant did not return.

After claimant's injury, he continued to work until he was terminated on July 14, 1995, because he could not work above ground. Claimant's attorney then sent him to Sharon L. McKinney, D.O., for examination and treatment. Dr. McKinney saw claimant on July 28, 1995. She found claimant to have a myoligamentous strain of the muscles in the S1 joint and sacral border and a left knee strain. She prescribed anti-inflammatory medication, appropriate exercises, and instructed claimant to wrap the left knee. She restricted claimant from stair climbing, jogging, squatting, and stooping. In reference to claimant's back complaints, she opined, "His back problem should resolve with medication and some stretching exercises" Additionally, she prescribed two or three physical therapy sessions. At this time, the doctor felt claimant could not work.

Claimant returned to Dr. McKinney on October 30, 1995. Claimant continued to have left knee complaints and he had some palpable tension and pain over the buttock muscles on the left. For the first time, claimant mentioned a small lump on the lateral upper surface of his left foot. The doctor again prescribed anti-inflammatory medication and ultrasound therapy for both the back and the knee. Claimant was to return to see Dr. McKinney in two weeks.

Claimant did not return to see Dr. McKinney again until February 16, 1996. Claimant testified he had not sought or received any medical treatment since the October 30, 1995, visit to Dr. McKinney. During the February 16, 1996, visit, Dr. McKinney found claimant with left knee pain and pain in S1 joint muscle region. She found claimant had a left quadriceps muscle weakness and some edema around the left knee cap. Claimant had palpable tenderness around the left S1 joint. But his muscle strength in the low back was normal. She also found a small "bony spur" at the fifth metatarsal of the left foot was causing claimant some pain. She prescribed anti-inflammatory medication, Tylenol, and a need to wrap the left knee when claimant was active on the knee. The doctor restricted claimant from stair climbing, ladder climbing, jogging, or jumping. Furthermore, claimant was instructed to avoid squatting, stooping, and heavy lifting when he had to bend his knees. In accordance with the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides), Third Edition (Revised), Dr. McKinney found claimant to have permanent functional impairment of the lower extremity of 15 percent for the left knee, two percent for the S1 hip strain, two percent for the weak

quadriceps muscle, and two percent for the "bony spur". The doctor combined the lower extremity ratings in accordance with the AMA Guides, Third Edition (Revised) to a 10 percent whole person functional impairment.

During Dr. McKinney's deposition testimony, she attributed her permanent restrictions of no stair climbing, ladder climbing, jogging, jumping, squatting, stooping, and heavy lifting not only for the left knee injury but also for the left hip injury. But when Dr. McKinney was questioned about how she utilized the AMA Guides, Third Edition (Revised) in determining her two percent lower extremity rating for claimant's left hip injury, she did not identify a specific reference contained in AMA Guides, Third Edition (Revised). She only indicated that she took into consideration muscle weakness, range of motion, and the effect those findings had on "function". Later in her testimony, she was again asked what she considered when she found the two percent lower extremity functional impairment for claimant's hip strain. She replied, "Primarily for the findings I palpated on physical exam and the effect on his walk that tension or tenderness would have."

At the request of McPherson's insurance carrier, Dr. Lynch saw claimant again on February 19, 1998. He found claimant's primary difficulty was his left knee complaints. The claimant also reported intermittent problems with his lower back and left hip. But the doctor did not think claimant had any limitation of activity because of those problems. Dr. Lynch diagnosed osteoarthritis of the left knee and residuals from a very mild strain of the left low-back area. Utilizing the AMA Guides, Fourth Edition, he found claimant to have no rateable residuals in the low back and left hip. Based entirely on the significant osteoarthritis in claimant's left knee, the doctor found a 20 percent lower extremity functional impairment which he converted to an eight percent whole body functional impairment.

Dr. Lynch had previously treated claimant in 1979 for a left knee injury that had occurred while claimant was working at the Goodyear tire plant in Topeka, Kansas. Claimant had torn the lateral meniscus in his left knee. As a result of that injury, on April 20, 1979, Dr. Lynch preformed a meniscectomy on claimant's left knee. At that time, claimant was performing heavy work at the Goodyear tire plant. After a period of rehabilitation, Dr. Lynch returned claimant to work with no permanent restrictions. He did assess claimant with a five percent permanent functional impairment. But Dr. Lynch could not recall whether or not the rating was based on the AMA Guides. Dr. Lynch attributed only one to two percent of the lower extremity functional impairment rating to the June 5, 1995, fall. The balance of the rating was attributed to claimant's left knee osteoarthritis condition. He placed permanent restrictions on claimant related only to the claimant's left knee injury. The doctor opined it would be difficult for claimant to engage in an occupation requiring long standing, lifting, crouching, or squatting.

During Dr. Lynch's examination, claimant did not complain and Dr. Lynch did not find a bony spur on the fifth metatarsal of claimant's left foot. Thus, Dr. Lynch did not assess any impairment for the bony spur and further did not attribute the bony spur to the June 5, 1995, accident.

Dr. Lynch expressed his opinions on claimant's permanent functional impairment based on the AMA Guides, Fourth Edition. Claimant's accident date was June 5, 1995, and the statute in effect on that date of accident required the AMA Guides, Third Edition (Revised) to be utilized in establishing permanent functional impairment.⁵ Therefore, Dr. Lynch's opinions in regard to claimant's permanent functional impairment as a result of the June 5, 1995, accident will not be considered.⁶

But the Appeals Board finds Dr. Lynch's physical examination findings are credible and can be used to support the conclusion that claimant did not sustain any permanent functional impairment as a result of the his low-back and left hip injury.

At the time Dr. Lynch examined claimant on February 19, 1998, he found normal range of motion both actively and passively in claimant's left hip. The only positive finding in regard to claimant's left hip was a rather mild tenderness in the abductor muscles just distal to left iliac crest.

Additionally, although claimant testified he continues to have discomfort in his low back and left hip area, when asked at the regular hearing why he did not attempt a job offered him digging holes, he replied he did not attempt the job because of his leg and made no reference to his low back or left hip. During claimant's July 5, 1995, visit to see Dr. Lynch, claimant made no complaints in regard to his low back and left hip. Furthermore, Dr. McKinney's initial assessment was that claimant's back problem should resolve with medication and some stretching exercises.

Claimant argues he proved through his testimony and the medical opinion of Dr. McKinney that he not only suffered a permanent functional impairment to his left knee but also to his left hip. Accordingly, claimant contends the June 5, 1995, work-related accident resulted in a whole body functional impairment rating. Thus, claimant argues he is entitled to a substantial work disability because he is earning less than 90 percent of his pre-injury average weekly wage and he has a work task loss from the permanent restrictions imposed as a result the June 5, 1995, work-related accident.⁷

⁵See K.S.A. 44-510e(a)

⁶See Birmingham v. Deffenbaugh Disposal Services, WCAB Docket No. 208,094 (April 1999).

⁷See K.S.A. 44-510e(a)

In a workers compensation case, the fact-finder's function is to decide which testimony is more accurate and credible and to adjust the medical testimony along with the testimony of the claimant and any other relevant testimony to decide the nature and extent of claimant's disability.⁸ For the reasons found above, the Appeals Board concludes, as did the Administrative Law Judge, that the preponderance of the credible evidence proves the only injury claimant sustained in the June 5, 1995, work-related accident that resulted in permanent functional impairment was the injury to claimant's left knee. Claimant also injured in this accident his right hand, low back, and left hip, but those injuries did not result in any permanent impairment. Therefore, the Appeals Board concludes claimant is limited to a scheduled injury to his left lower extremity and not a whole body injury which would entitle him to a substantial work disability.

Has the amount preexisting functional impairment been proven to reduce the award?

The Administrative Law Judge not only limited claimant's award to a scheduled left lower extremity injury, but he also found Dr. Lynch's opinion, that claimant's preexisting osteoarthritis condition attributed to all the left knee injury's functional impairment except for two percent, was credible. Based on that opinion the Administrative Law Judge found the respondent was entitled to an offset for the preexisting functional impairment as specified in K.S.A. 44-501(c) and awarded claimant only a two percent permanent partial disability of the left lower extremity.

As previously noted, Dr. Lynch's functional impairment ratings were all made in accordance with the AMA Guides, Fourth Edition and can not be considered for this date of accident. Therefore, the Appeals Board concludes, when Dr. Lynch's testimony on permanent functional impairment is disregarded, there is no medical opinion to prove the extent of claimant's preexisting left knee functional impairment. After Dr. Lynch preformed the 1979 meniscectomy on claimant's left knee, he released claimant to regular heavy work without restrictions. The doctor's medical records indicate he did assess a five percent permanent disability. But Dr. Lynch could not recall if that opinion was pursuant to the AMA Guides. Furthermore, claimant testified, after his 1979 left knee injury, he had no problems performing heavy work and also was able to participate in athletic activities before this accident. Based on these facts, the Appeals Board finds the record has failed to prove the extent of preexisting impairment.⁹

The only physician who expressed an opinion on claimant's permanent functional impairment as it relates to his left knee injury utilizing the AMA Guides, Third Edition (Revised) was Dr. McKinney. She found claimant had a 15 percent permanent functional

⁸Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

⁹See Lodwick v. Rubbermaid Specialty Products, WCAB Docket No. 204,829 (August 1998)

impairment of the left lower extremity as a result of the June 5, 1995, accident. The Appeals Board adopts her opinion and awards claimant a 15 percent permanent partial disability of the left lower extremity.

What is claimant's pre-injury average weekly wage?

The Administrative Law Judge found that claimant's pre-injury average weekly wage was \$660.00. This is the average weekly wage as argued by the claimant before the Administrative Law Judge and now before the Appeals Board. Claimant testified he was hired by White Star to work 40 hours per week at \$16.50 per hour. But he actually only worked three or four days per week because on occasion sheet rockers had not completed enough work ahead for painters to work. Claimant testified, however, he was expected to show up at work every day and sometimes would be sent home.

Conversely, McPherson argues that White Star's payroll records, admitted into the record, showed claimant only worked three or four days per week. Therefore, McPherson argues claimant was a part-time employee and not a full-time employee as defined in the Workers Compensation Act. McPherson contends these payroll records indicate that claimant's average weekly wage was \$367.83.

The Appeals Board agrees with the Administrative Law Judge's finding and claimant's arguments that claimant was hired as a full-time employee as defined in the Workers Compensation Act.¹⁰ Thus, claimant's average weekly wage should be computed based on a 40-hour work week because he was expected to work 40 hours.¹¹ Therefore the Appeals Board concludes claimant's pre-injury average weekly wage should be computed by taking claimant's hourly rate of \$16.50 times 40, the number of hours he was expected to work, equalling an average weekly wage of \$660.00.

Is McPherson, as the principal contractor, entitled to an order requiring Paint Pros of America, Inc., allegedly formerly operating as White Star, for reimbursement of all amounts paid on this claim?

The record has established that claimant was the employee of White Star, a subcontractor of the principal contractor, McPherson, on the date of his accident. White Star was uninsured and otherwise unavailable and therefore McPherson is liable for payment of the claim as the statutory employer of claimant.¹² On May 11, 1998, McPherson implead Paint Pros of America, Inc., in this matter as the subcontractor. McPherson alleged that Paint Pros of America, Inc., formerly did business as White Star. Therefore, McPherson requested the Administrative Law Judge to enter an order to recover against Paint Pros of America, Inc., as McPherson's subcontractor, for all benefits and costs paid in this case. But there is no proof of service contained in the

¹⁰See K.S.A. 44-511(a)(5).

¹¹See K.S.A. 44-511(b)(4)(B) and Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991)

¹²See K.S.A. 1994 Supp. 44-503.

record¹³ and Paint Pros of America, Inc., did not appear. Also the Administrative Law Judge never entered an order adding Paint Pros of America, Inc., to this claim.

If the principal contractor pays compensation to a worker of a subcontractor, the principal contractor has the right to recover over against the subcontractor in an action under the Workers Compensation Act.¹⁴ The principal contractor also has the right to implead the subcontractor, if the subcontractor has not already been joined in the case.¹⁵

The Appeals Board finds the record in this case proves that claimant was an employee of White Star, the subcontractor of the principal contractor, McPherson. McPherson did not implead White Star because claimant had brought White Star into the proceedings before McPherson was joined in the proceedings. McPherson now alleges Paint Pros of America, Inc., is the subcontractor because it formerly did business as White Star.

As found above, there is no record before the Appeals Board that Paint Pros of America, Inc., was served with the impleading, and Paint Pros of America, Inc., did not appear. Therefore, the Appeals Board finds it cannot make an order in regards to Paint Pros of America, Inc. But the Appeals Board does find and orders White Star, a subcontractor of McPherson, to reimburse McPherson for all benefits and costs paid in this claim.

McPherson also requested its attorney fees be ordered assessed against Paint Pros of America, Inc. The Appeals Board finds there is no statutory provision in the Workers Compensation Act to make an award of attorney fees under these circumstances.

Should claimant be ordered to pay the cost of a missed appointment with McPherson's vocational expert?

The Administrative Law Judge found claimant did not intentionally or negligently miss a scheduled appointment with McPherson's vocational expert. Therefore, the Administrative Law Judge denied McPherson's request to assess those costs against the claimant.

The Appeals Board agrees and affirms the Administrative Law Judge's decision to deny McPherson's request to assess the costs of the missed appointment against the

¹³Respondent attached a certified mail receipt to its brief before the Appeals Board. But that receipt cannot be considered because it was not made part of the record before the Administrative Law Judge. See K.S.A. 1998 Supp. 44-555c(a).

¹⁴See K.S.A. 1994 Supp. 44-503(f).

¹⁵See K.S.A. 1994 Supp. 44-503(e).

claimant. Claimant missed one appointment because he did not receive notice of the appointment until after it was scheduled. The other appointment missed by claimant was because he thought the appointment was in Topeka but the appointment was in Kansas City, Kansas.

Further, the Administrative Law Judge's order, requiring McPherson to pay as authorized medical expenses the medical billings admitted as exhibits at the regular hearing, is affirmed and adopted by the Appeals Board. Those authorized medical expenses should include medical treatment required to treat claimant for all the injuries he suffered in the June 5, 1995, accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Bryce D. Benedict's November 17, 1998, Award should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Fred J. Church, and against the respondent, McPherson Contractors, Inc., and its insurance carrier, Kansas Building Industry W.C. Fund, for an accidental injury which occurred June 5, 1995, and based upon an average weekly wage of \$660.00.

The claimant is entitled to 30.86 weeks of temporary total disability compensation at the rate of \$319 per week or \$9,844.34, followed by 25.37 weeks of permanent partial disability compensation at the rate of \$319 per week or \$8,093.03 for a 15% permanent partial scheduled disability of the left lower extremity, making a total award of \$17,937.37, which is all due and owing and is ordered paid in one lump sum less amounts previously paid.

White Star is ordered to reimburse McPherson for all amounts paid in this Order.

All reasonable and authorized medical expenses for all injuries claimant suffered in the June 5, 1995, accident are ordered paid by McPherson.

All other orders contained in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of December 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I agree with the majority's finding that the percentage of claimant's preexisting functional impairment has not been established pursuant to the AMA Guides. But I disagree with the conclusion that respondent bears the burden of proof for this. K.S.A. 44-501(a) clearly places the burden of proof on the claimant. I do not interpret K.S.A. 44-501(c) as shifting this burden to respondent by requiring respondent to prove the percentage of claimant's preexisting functional impairment. K.S.A. 44-501(c) provides:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

It is claimant's burden to prove all of the various conditions upon which his entitlement to compensation depends. This includes proving what the nature and extent of his disability is from the alleged work-related accident. Claimant bears the burden of proving how much of his present functional impairment is from the work-related accident.

BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS
Matthew S. Crowley, Topeka, KS
White Star Commerical Coating, Inc., Kansas City, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director